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ABSTRACT

This booklet is the first in a series about teacher union issues. It notes that agency fees raise profound issues in education, labor relations, and public policy. Chapter 1 introduces the booklet, explaining that it is helps clarify major agency fee issues and recommend appropriate action. Chapter 2, NEA/AFT Revenues from Agency Fees, explains the dependence of union revenues on agency fees. Chapter 3, The Case Against Agency Fees, explains that not every teacher benefits from union representation, discussing objections to agency fees. Chapter 4, Challenges to Excessive Agency Fees, investigates how unions allocate expenditures and how and why excessive agency fees are challenged. Chapter 5, Conclusions and Recommendations, presents negative conclusions about agency fees, explaining that agency fees constitute taking money from employees for purposes they do not wish to support and activities that may be against their interests. It discusses what teachers subject to agency fees should do, what school board members and school administrators should do to help eliminate agency fees, and how state legislators can help. Three appendixes offer an agency fee article taken from an existing school district contract; a New York state teachers' union notice to all nonmembers (which shows how unions extract excessive fees by misleading notices to teachers); and a local union letter to nonmembers that illustrates how they try to persuade them to become members. (Contains 9 references and 14 endnotes.) (SM)

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Agency Fees: How Fair Are "Fair Share" Fees?

Myron Lieberman

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EPI Series on Teacher Unions

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Foreword

This booklet is the first in the Education Policy Institute (EPI) series about teacher union issues. As is evident from the content, agency fees raise some of the most profound issues in education, labor relations, and public policy generally, and EPI was especially fortunate to have Dr. Myron Lieberman serve as the author of the first publication in this series. A life member of the NEA and a former candidate for president of the AFT, Dr. Lieberman has negotiated hundreds of school district labor contracts in seven states. This wealth of experience on both sides of the table is reflected in his analysis of agency fee issues in American education. Although Dr. Lieberman's analysis is formulated in the context of public education, I am confident that it will be just as useful in state and local public employment generally as it will be in public education.

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The Education Policy Institute will normally approve requests to publish and disseminate this publication in whole or in part, provided appropriate credit is accorded the Education Policy Institute and Dr. Lieberman. Criticisms, suggestions, and inquiries about it (or any other EPI publication) are welcome and may be addressed to either Dr. Lieberman or myself at:

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Chapter 1
Introduction

In this report, I try to clarify the major agency fee issues and recommend courses of action deemed appropriate in the light of these clarifications. Although the discussion is applicable to state and local public employment generally, it is addressed to educators and formulated in terms of educational employment relations.

Agency fees are the amounts that nonmembers of a union must pay to the unions for representation services. Nonpayment ordinarily results in dismissal from employment. Inasmuch as nonmembers must pay the fees or lose their jobs, agency fees raise basic issues about individual rights and how they relate to group rights in the workplace. Agency fees also raise issues concerning the role of employers, who often play a key role in whether agency fees are required, the amount of the fee, how the fees are paid, and what procedures are available to challenge the amount of the fee.

Agency fees are the amounts that nonmembers of a union must pay to the unions for representation services.

Agency fee issues arise in the context of collective bargaining by teacher unions. Such bargaining and the legal status of agency fees are regulated by the states as follows:

- States that have enacted collective bargaining statutes and require payment of agency fees by state law: Hawaii, Minnesota, and New York.
- States that have enacted bargaining statutes that allow teacher unions to negotiate agency fees: Alaska, California, Connecticut, Delaware, Illinois, Maryland (only in Baltimore and four counties), Massachusetts, Michigan, Montana, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, and the District of Columbia.
- States that have enacted bargaining statutes, but prohibit agency fees, at least in public education: Florida, Idaho, Indiana, Iowa, Kansas, Maine, Nebraska, Nevada, New Hampshire, New Mexico (dues deduction a mandatory subject of bargaining), North Dakota, Oklahoma, South

Dakota, Tennessee, and Vermont.

- States that allow collective bargaining as a school board option, but prohibit agency fees: Alabama, Arkansas, Colorado, Kentucky, Louisiana, Missouri, and West Virginia.
- States that prohibit collective bargaining in public education and agency fees: Arizona, Georgia, Mississippi, North Carolina, South Carolina, Texas, Utah, Virginia, and Wyoming.
- States that prohibit agency fees are "right to work" states. In these states, employment may not be conditioned upon membership in or payment of any fees to teacher unions in order to work. Thus the following discussion is directly applicable to the 19 states that require or allow agency fees. The discussion is relevant elsewhere as a basis for considering whether or not to authorize or require agency fees in public education.

The Case For Agency Fees

The union must bargain for all teachers, nonmembers as well as union members.

The case for agency fees arises out of exclusive representation and the duty of fair representation. In collective bargaining, once it is chosen by a majority of employees in an appropriate unit, the union is the "exclusive representative." The union must bargain for all teachers, nonmembers as well as union members. Neither members nor nonmembers can bargain on their own, either as individuals or in subgroups. Not only must the union represent all the teachers; it is prohibited from negotiating terms and conditions of employment for nonmembers that differ from those negotiated for members. The nonmember, therefore, allegedly receives the benefits of union representation but, in the absence of agency fees, has no obligation to share the costs of it. The nonmembers are said to be "free riders" in this situation. In the union view, nonmembers are comparable to citizens who receive the benefits of government but do not pay their share of the taxes. This is why agency fees are often referred to as "fair share fees." If subject to agency fees, nonmembers must pay their "fair share" of the costs of union representation.

The union's legal obligation to represent everyone im-

partially is "the duty of fair representation." This duty, in conjunction with exclusive representation, constitutes the core argument for agency fees. Knowing that whatever the union negotiates they will be treated the same as union members, nonmembers have a strong incentive not to join and not to pay union dues. This problem arises whenever members of a group receive benefits but are not required to share the costs of achieving and protecting them.

In 1967, the U.S. Supreme Court upheld the constitutionality of public sector agency fees in *Abood v. Detroit Board of Education*.[1] In *Abood*, the Supreme Court held that nonmembers could be required to pay their pro rata share of the union's costs of collective bargaining, contract administration, and grievance processing (hereinafter referred to simply as "collective bargaining"). All other union expenditures were held to be nonchargeable to nonmembers. This, however, was not the U.S. Supreme Court's last word on the subject. In *Lehnert v. Ferris Faculty Association* (1991), perhaps the most important subsequent case on chargeability, the nine member court ruled on whether union expenses are chargeable to agency fee payers as follows:

Yes: Nonmembers can be forced to pay (chargeable).

No: Nonmembers cannot be required to pay (nonchargeable).

- Lobbying, unless necessary to ratify or fund the nonmembers' specific bargaining agreement. No: 7-1.
- Electoral politics, including ballot and bond issues. No: 8-1.
- Public relations activities. No: 8-1.
- Litigation not specifically on behalf of the nonmembers' bargaining. No: 7-1.
- Bargaining and other related activities on behalf of persons in other bargaining units and other states. Yes: 9-0, unless the extra-unit activity is wholly unrelated to the nonmembers' bargaining unit and cannot ultimately inure to the benefit of the nonmembers' unit.
- Miscellaneous professional activities, i.e., general teaching and education, professional development, unemployment, job opportunities, award programs, and other miscellaneous matters. Yes: 5-4.

- Local delegate expenses to attend conventions of the local's state and national affiliates. Yes: 5-4. The Court explicitly did "not determine whether [nonmembers] could be commanded to support all the expenses of these conventions."
- Threatening and preparing for illegal strikes. Yes: 6-3.

Although the issue was not specifically presented, the Court also said that a union payment "in the nature of a charitable donation would not be chargeable to nonmembers."[2]

As will be evident, however, union accounting practices render it extremely difficult for nonmembers to challenge union determinations of chargeability.

Chapter 2
NEA/AFT Revenues from Agency Fees

Union revenues are much more dependent on agency fees than is widely realized. In 1997-98, the National Education Association (NEA) enrolled approximately 2.3 million members, of whom about 1.7 million were full-time classroom teachers. NEA revenues amounted to $213 million, exclusive of the NEA's PAC funds, foundations, and special purpose organizations. According to NEA financial statements, 23,000 agency fee payers paid $2.4 million, 1.29 percent of the NEA's $185.7 million budget in 1995-96. These figures refer only to NEA revenues. In right-to-work states, the state and local affiliates receive no income from agency fees; in states which authorize or mandate agency fees, union financial statements indicate that agency fees are 2 to 4 percent of state and local revenues.

NEA's figures grossly underestimate NEA revenues from agency fees. In many school districts, some teachers join the union and pay union dues only because the difference between the agency fees and dues is not worth the hassle associated with nonmembership. For this reason, NEA financial statements that distinguish dues from agency shop income are highly misleading; a considerable amount of dues income is the result of agency fees.

To understand why, suppose that combined local, state, and national dues in the NEA are $500. Suppose also that the agency fee in District A is 85 percent of dues, but only 35 percent in District B, each of which employs 100 teachers. On this basis, the results are as follows:

	District A	District B
Dues	$500	$500
Agency fee percent	85	35
Agency fee paid to union	$425	$175
Teacher saving from paying agency fee instead of dues	$75	$325
Total number of teachers	100	100

Total number of fee payers	10	15
Union revenues from agency fees	$4,250	$2,625
Total union revenues	$49,250	$45,125

If there were no agency fees, nonmembers in both Districts A and B would not pay anything to the union. In our hypothetical districts, however, only 10 teachers in A decide that the $75 saved by not joining the union isn't worth the criticism and loss of rights to participate in union affairs. It may be that if teachers in A were required to pay only $175 in agency fees, more would act like the 15 teachers in B, who have concluded that the $325 savings justifies nonmembership. Clearly, the closer the agency shop fees are to dues, the more teachers will opt for membership and payment of full dues instead of agency fees. This is why there is invariably an increase in union membership when agency fees of 60 percent or more of dues are negotiated.

Clearly, the closer the agency shop fees are to dues, the more teachers will opt for membership and payment of full dues instead of agency fees.

Because the point at which teachers will choose union dues over agency fees varies, we cannot say precisely how much dues income is due to the existence of agency fees. Strong evidence on the issue is to be found in state comparisons of "union density," that is, the percent of teachers who are members of the NEA or AFT. Although differences in union density cannot be attributed solely to agency fees, union density is highest in the states with high mandatory agency fees.

Over time, the unions tend to be very successful in negotiating agency fees. For example, it appears that more than 90 percent of Michigan teachers are union members, a percentage clearly attributable to Michigan's high agency fee requirements. Within other states that allow unions to negotiate an agency fee, the percentage of teachers who are agency fee payers varies considerably from district to district. Usually, the highest percentages of agency fee payers are in the large urban districts. School boards that employ a small number of teachers, especially in rural areas, are the least likely to agree to an agency fee requirement.

One of the critical issues in agency fee litigation was

whether agency fees applied to state and national as well as local union dues. After all, the local union is the exclusive representative, whereas, state and national affiliates are not. Obviously, this was a critical issue, and in *Lehnert*, the U.S. Supreme Court held that state and national affiliates of local unions were also entitled to agency fees, based on the share of their expenses spent for collective bargaining. The NEA's argument was that state and national dues constituted a sort of resource bank which local unions could draw upon for help as needed. This argument prevailed in the Supreme Court decision, which has been worth hundreds of millions to U.S. labor unions.

NEA revenues from agency fees are from only nineteen states, and the District of Columbia, which mandate or allow them. In these nineteen states, the fee payments may be 4 to 5 percent of NEA revenues from the state. They are also a substantial source of state and local association income.

To illustrate, in 1995, the California Teachers Association (CTA) received agency fees from 14,360 individuals. Since some worked only part-time, we reduce the number by five percent to 13,642 full-time fee payers paying $345 each for local, CTA, and NEA agency fees. On this basis, NEA, CTA, and California local education associations received more than $4.7 million from California teachers unwilling to join the NEA and its state and local affiliates. Inasmuch as this amount does not include agency fees paid to the AFT and its affiliates, nor to other school district unions, it underscores the importance of agency fees to teacher unions. Although the $2.4 million from agency fees was officially only 1.29 percent of the NEA budget, agency fees are a much larger percentage of state and local association budgets.

The preceding discussion has focused on NEA revenues from agency fees. It is safe to say, however, that the AFT and its affiliates are even more dependent on these revenues than is the NEA and its affiliates. In 1997-98, the agency fee for the national AFT was approximately 73 percent of dues; the agency fee for the New York State United Teachers, which enrolls about a third of all AFT members, charged agency

fees that were 96 percent of dues. To put it mildly, the NYSUT allocation is difficult to accept as a financial reality, regardless of the absence of any legal objections to it. Appendices B and C illustrate the kinds of letters from their state and local union that nonmembers receive in New York state. Obviously, the nonmembers face immediate pressure from the union to join and pay full union dues and assessments.

The fact is, however, that union financial statements grossly understate union revenues from agency fees in still another way. Unions are much more likely to raise their dues if employees must pay either dues or agency fees. This is why both the highest union density and the highest dues are in states in which the agency fees are mandatory or negotiable.

Go back to our previous example, where the dues in district A were $500 and the agency fee was 85 percent of dues, or $425. Now, suppose the dues are raised to $600 and three times as many teachers (30 instead of 10) choose to be nonmembers. This would be a relatively high total dues increase for any one year, but it does not affect the validity of the example. The union's financial picture would be as follows:

	District A	
	(Before dues increase of $100)	(After dues increase of $100)
Number of teachers	100	100
Dues	$500	$600
Agency fee %	85	85
Agency fee paid to union	$425	$510
Teacher saving from membership	$75	$90
Union members	90	70
Union revenues from members	$45,000 (90x$500)	$42,000 (70x$600)
Union revenues from nonmembers	$4,250 (10x$425)	$15,300 (30x$510)
Total union revenues	$49,250	$57,300

In short, although nonmembership tripled from 10 to 30 as a result of the dues increase, total union revenues increased $7,050, or 14.3 percent. High agency fees enable unions to raise the dues and not worry about financial losses resulting from teachers opting for nonmembership in the union.

The legal status of compulsory union membership and compulsory union dues is widely misunderstood. It is often asserted that unions can require employees whom they represent to be union members. As a matter of law, this assertion is not true. Through various means, such as agency fees, unions can pressure employees to become or remain union members, but it is not accurate to say that employees can be required to become or remain union members to get or keep their jobs.

Similarly, it is often said that the teacher unions can require teachers to pay union dues. Although the NEA/AFT would like school boards and teachers to believe this, the unions cannot legally require the teachers they represent to pay full union dues. In some states and school districts, the unions continue to charge nonmembers the full amount of union dues, but that happens because the nonmembers do not know their rights or are not willing to assert them for one reason or another.

It is not accurate to say that employees can be required to become or remain union members to get or keep their jobs.

The sad truth is that after several years of litigation over the issue, a recent U.S. Supreme Court decision has upheld the right of labor unions to mislead employees on this issue. In *Marquez v. Screen Actors Guild*, the contract between the union and a movie producer included a clause that required "membership [in the union] on or after the thirtieth day following the beginning of...such employment." The contract did not explain that as a result of U.S. Supreme Court cases, employees could fulfill this membership requirement by paying only the employee's pro rata share of the union's costs of collective bargaining.

The plaintiff in the case was an actress who was replaced by the producer because she had not paid the union dues by the day before she was to have begun to work. Thereupon, the plaintiff sued, alleging that the union had violated

its duty of fair representation because the union contract did not point out that the union security clause could not be legally enforced to require payment of full union dues.[3]

In holding against the plaintiff on this issue, the U.S. Supreme Court pointed out that the union did have a responsibility to inform employees of their rights not to pay full union dues. The issue before the Court was whether the union breached its duty of fair representation by not including contractual language stating this right. The Court held that this was not required because the union could inform employees of their rights through other means.

The *Marquez* case illustrates an extremely important fact about agency fees. Employees need not pay either dues or fees in the absence of an employer's agreement to require payment of dues or fees to the union as a condition of employment. In some contracts, the employees are required to pay agency fees, but the employer has not contractually agreed to fire the employees who have refused to pay them. Thus, even in agency fee districts, it is not always true that refusal to pay agency fees leads to dismissal from employment.

Chapter 3
The Case Against Agency Fees

Having stated the case for agency fees, let us turn to the case against them. First of all, the contention that everyone benefits from union representation is fallacious on its face. Some teachers are clearly worse off under union representation. For example, unions negotiate layoff procedures based upon seniority – last hired is first fired. Teachers who are fired under union negotiated procedures, but who would not have been otherwise, hardly "benefit" from union representation. Teachers in difficult-to-staff subjects, such as mathematics and science, would often be paid higher salaries than they receive under union negotiated single salary schedules. Newly employed teachers would often be paid more if the union had not insisted on higher salaries for senior teachers. Single teachers without dependents would often enjoy higher salaries were it not for the fact that the union opted for family health insurance instead of higher salaries.

The contention that everyone benefits from union representation is fallacious on its face.

The union rebuttal to these criticisms is based upon the fact that in the short run, it is impossible to satisfy all the interests in the bargaining unit. Senior teachers want higher maximum salaries; new teachers want higher beginning salaries and fewer steps to reach the maximum. Teachers with advanced degrees want higher differentials for them; teachers with only a bachelor's degree want more funding for the regular schedule. Single teachers want single employee insurance coverage; married teachers want spousal and family coverage, and so forth.

At any given time, it is impossible to satisfy all of these and other conflicts to the satisfaction of all the teachers who are affected by them. The union, in negotiations with management, tries to arrange the tradeoffs that lead to a mutually acceptable agreement. In practice, the internal conflicts are not necessarily resolved in the interests of the majority; however, since the proposed agreement must usually be ratified by the members of the union (not necessarily all the teachers affected by the proposed agreement), let us assume for the

sake of discussion that the agreement is in the interests of the majority of unit members, that is, teachers represented by the union.

One problem is that agency fees rest on the proposition that everyone in the bargaining unit benefits from union representation, but clearly everyone does not benefit. This conclusion is not affected by the fact that at any given time, it is impossible to satisfy all the demands of unit members. As a practical matter, some legitimate demands of subgroups within the bargaining unit will never be satisfied under exclusive representation. Let us see how and why this is so.

The duty of fair representation was laid on unions in the 1944 *Steele* case involving racial discrimination.[4] Essentially, a union of white railroad employees represented black employees who were not allowed to join the union. When the black employees challenged their exclusion, the Supreme Court came up with "the duty of fair representation" to preserve exclusive representation. As previously noted, under the duty of fair representation, the union must represent nonmembers as well as members equally and without discrimination. Note that internal democracy within the union does not necessarily prevent unfair or discriminatory treatment of either members or nonmembers, or even nonemployees. For instance, in the *Steele* case, the fact that the internal union processes were fair and democratic had no bearing on the injustice against black nonmembers excluded by the union. Such cases arise constantly outside of the racial context.

For example, mathematics teachers who could command higher salaries except for union representation, may never be able to convince the union to negotiate salary differentials for mathematics teachers. The mathematics teachers may have unimpeachable data showing that the demand for their talents outside of education is much greater than the demand for the talent required to be a history teacher. Consequently, unless some school districts are willing to pay more for mathematics than history teachers, they will be forced to employ mathematics teachers who do not have the talent required to perform adequately.

The important point here is not whether the mathemat-

ics teachers are right. The point is that they are represented by a union that has been, and is likely to continue to be, strongly opposed to salary differentials for mathematics teachers. For this reason, the union is much less likely to present the argument for differentials fairly to the school board, if indeed the union presents the argument at all.

Clearly, the situation presents a union conflict of interest. On the one hand, the union is supposed to represent the mathematics teachers fairly and impartially. On the other hand, to do so would endanger the union interest in maintaining a single salary schedule. The union has a strong interest in maintaining a single salary schedule because it needs to avoid internal controversies over what subgroups should get more and what subgroups should get less. Inasmuch as such controversy would or could destroy union solidarity, the unions oppose it. Unfortunately, the harm done to teachers who could earn more in other employment is only part of the harm done to teachers represented by the union. Obviously, the mathematics teachers are not the only group of teachers who lose more than they gain from union representation. Requiring such teachers to pay their "fair share" of the costs of union representation is a triumph of semantics over substance.

Under union representation, mathematics teachers must persuade the majority of teachers to agree to the higher salaries for mathematics teachers. The chances that this will happen are virtually zero. The situation presents a conflict of interest that continues indefinitely. It differs significantly from the impossibility of satisfying everyone's demands at any given time. Granted, the mathematics teachers may regard other benefits of unionization, such as job protection, as compensating for their low salaries as teachers, but clearly many mathematics teachers are permanently and substantially disadvantaged by union representation.

The unions seek the duty of representing everyone, and would be greatly upset if employees could negotiate their terms and conditions of employment individually. Furthermore, the unions seek exclusive representation even where agency fees are not allowed. And even if agency fees are allowed, it does not follow that nonmembers should pay a

pro rata share. For example, suppose that a bargaining unit includes 250 teachers, of whom 249 are union members. The union's costs of representing all 250 may not be a penny more than its costs of representing the 249.

Note also that every agency fee per se results in two losses to the fee payers. They lose the option of contracting on their own and also their leverage in union affairs. In the context of teacher/union relations, the teacher is a consumer of representational services; the union a producer of them. In most situations, withdrawal as a client or customer is the most effective way to influence producers. Taking away the teacher's right not to buy union services is taking away the teacher's ability to influence the union, the only feasible way for most teachers to influence union decisions. Where agency fees are in effect, dissident teachers often have no leverage on the union. Persuading other teachers to take action may require teacher time and resources that are not available. In contrast, if teachers need not pay anything to the union, teachers do not have to be politically active within the union to exert their influence.

A strong and independently decisive objection to agency fees is that fee payers are forced to subsidize political causes to which they are opposed.

A strong and independently decisive objection to agency fees is that fee payers are forced to subsidize political causes to which they are opposed. Most observers, including many supporters of agency fees, agree that teachers, or any employees, public or private, should not be forced to do this, regardless of whether their jobs are at stake. The principle is not the issue; it is whether any NEA/AFT expenditures from dues and agency fees subsidize political causes that are opposed by some members and agency fee payers. The NEA/AFT deny that this happens, but their argument rests upon a legal meaning of "political" that is unrealistic in practice. Federal law prohibits unions from spending dues and agency fees for political purposes; however, federal law defines "political" as support for candidates for public office. Thus, legally, the teacher unions cannot contribute regular union revenues to support or oppose candidates. At the same time, they can spend as much as they wish to support positions espoused by candidates, that is, for "issue advertising." For example, the unions could not charge nonmembers for the election ex-

penses of a candidate for Congress, but they could charge for advertisements supporting positions espoused by the candidate. Both the Democratic and Republican parties evade the intent of the campaign finance laws this way, but the issue here is the legitimacy of forced contributions to political causes.

Theoretically, agency fee payers cannot be charged for union political expenditures, but actually they are charged a great deal for them. As previously noted, the U.S. Supreme Court has held, by a 5 to 4 majority, that union expenses for their national conventions are chargeable to agency fee payers. Both the NEA and the AFT have conducted several activities to support the Clinton/Gore ticket and Democratic candidates for office at all of their national conventions from 1992 to 1998. For example, candidates for national office, such as President Clinton and Vice President Gore, received awards and were featured speakers at the union conventions, as were their surrogates such as Hillary Rodham Clinton. It is ridiculous to assert that these activities were not "political". The fact that federal legislation that treats only expenditures explicitly supporting or opposing candidates as "political" does not change the underlying fact that the NEA/AFT are utilizing agency fees (and dues as well) to support political candidates as well as political causes.

The NEA/AFT are utilizing agency fees (and dues as well) to support political candidates as well as political causes.

Perhaps the most fundamental objection to agency fees is that it eliminates the fee payer's constitutional rights to petition government for redress of grievances. Like all members of the bargaining unit, the agency fee payer is represented by the union, and only the union, on matters subject to bargaining. The fee payer cannot appeal to the school board or school administration to redress any grievances the fee payer may have; that role is reserved to the union, and only the union. Constitutionally, the fee payer can state his/her grievance, but any follow-up discussion of it with the school administration is likely to be deemed an unfair labor practice. As a matter of fact, the NEA tried to abolish completely the right of any member of a teacher bargaining unit to state his/her objection to school board action at a school board meeting, even if no negotiations were involved. Only

a unanimous decision by the U.S. Supreme Court frustrated the NEA's efforts to curtail the constitutional rights of teachers to petition government on grievances relating to terms and conditions of teacher employment.[5]

The *Madison* case arose in the following way. As the bargaining agent for the Madison, Wisconsin teachers, the Madison Education Association proposed that an agency fee provision be included in its contract with the Madison Board of Education. Just before the board was to vote on the negotiated agreement, which included the agency fee provision, a few teacher opponents of the agency fee provision appeared at a school board meeting to express their reservations about the agency fee requirement. The teachers involved emphasized that they did not claim the right to negotiate on the issue; their sole purpose was to invite the board's attention to their concerns and to urge the board to defer a decision on the issue until it had fully considered the matter.

Subsequently, the board approved the contract without the agency fee requirement, and the association filed unfair labor practice charges with the Wisconsin Employment Relations Commission (WERC) against the board for bargaining with an entity other than the association. The association charged that by allowing the dissident teachers to express their views on the issue at an open board meeting, the school board had violated its duty to bargain only with the association, the exclusive representative of the teachers in the bargaining unit.

When the WERC upheld the charges, the board of education appealed its decision to the Wisconsin Supreme Court. When the Wisconsin Supreme Court also upheld the decision, the board of education appealed the decision to the federal courts, and the appeal eventually reached the U.S. Supreme Court. In a unanimous decision, the Supreme Court reversed, holding that the prior decisions of the WERC and Wisconsin Supreme Court violated the teachers' rights to freedom of speech and the right to petition government for redress of grievances.

Had the NEA's views prevailed in this case, teachers in bargaining units would have been deprived of basic constitutional rights enjoyed by citizens not represented by unions.

Although widely regarded as the protector of teacher rights, the NEA's efforts to prevent teachers from expressing their grievances to their boards of education was a disturbing curtailment of them. To some scholars of constitutional law, there is no way to reconcile the NEA's position with the constitutional right to petition government for redress of grievances.[6]

Bargaining on agency fees

The foregoing discussion indicates that school boards are performing a disservice to their teachers by imposing agency fees on nonmembers of the union. How, then, do unions persuade school boards to accept agency fees?

The union's first argument at the bargaining table is that nonmembers should pay their "fair share" of the costs of union representation. In addition, the union argues that agency fees help the school board in two ways. First, union negotiators are frequently reluctant to agree to board proposals that would antagonize teachers. If there is no agency fee, teachers will withdraw from the union, thereby reducing union revenues. If, however, the school board accepts agency fees, the union can afford to agree to proposals that will be unpopular with teachers. Even dissatisfied teachers who resign from the union will still have to pay an agency fee that is almost equivalent to dues. In short, agency fees enable union negotiators to act as educational statesmen in difficult situations. This is the argument.

One problem with this argument is that the unions are not more reasonable as a result of agency fees. Perhaps there are districts in which the above scenario materialized, but there is no systematic evidence that supports the claim. And if one compares union contracts that include agency fees with contracts that do not, the former tend to be more disadvantageous to the board. The reason is that the agency fee strengthens the union and enables it to adopt a much more militant position on bargaining issues. In fact, the most restrictive contracts in the nation from a management point of view, such as in Toledo, Ohio, and Rochester, New York, are in agency fee districts.

A similar union argument relates to the possibility of

competition from another union. If nonmembers must pay agency fees, they are less likely to join a rival teacher union. The reason is that teachers are seldom willing to pay dues, or at least any substantial amount of dues, in addition to their agency fee payments. Agency fees greatly reduce the possibility of establishing a union that can compete with the union that is the bargaining agent.

Presumably, the tendency to minimize the likelihood of a competing union is a benefit to the school board. Competing unions typically compete on the basis of who can squeeze the most concessions from the school board. Union rivalry in a school district is often very disruptive and has a negative effect on teacher morale.

The question is whether school boards should deprive teachers of their ability to decertify an incumbent union. As a practical matter, agency fees have this effect. In choosing a union, teachers do not make a permanent choice. At certain times, usually the 90-day period preceding the expiration of the contract, teachers have the right to vote for a different union, or, if they wish, not to be represented by any union. In labor union terminology, voting out an incumbent union is "decertification." In practice, however, agency fees weaken the ability of teachers to support a rival to the incumbent union. Teachers are very unlikely to pay adequate dues to a rival union in addition to agency fees. Furthermore, many school boards have unwisely granted incumbent unions exclusive rights to meet in the schools, use the district mail system, and address teachers at faculty meetings. When agency fees are present along with the other advantages of incumbency, it is extremely difficult for dissatisfied teachers to decertify an incumbent union.

In most school districts, teachers are not likely to try to decertify the incumbent union even when most teachers are dissatisfied. In these situations, teachers are more likely to try to elect a different slate of union officers and negotiators. These efforts have the same negative effects as a representation election between rival unions. In short, the agency fee doesn't necessarily prevent disruptive union conflict. With an agency fee, teacher dissatisfaction with the union's performance usually emerges as intra-union conflict, hence the

school board gains little if anything by requiring teachers to pay substantial amounts to unions they do not wish to support.

Despite these considerations, school boards and school administrators are frequently unable to resist the temptation to impose agency fees on their teachers. The temptation arises from the fact that the unions are usually willing, even eager, to offer significant concessions on other matters as a quid pro quo for agency fees. The fact that the agency fee comes out of the pockets of the teachers, not the school district budget, greatly enhances its appeal to school boards.

On many occasions, school boards have refused to agree to an agency fee for several years. Sooner or later, however, negotiations take place at a time when the school board can offer little or nothing in its economic package. The union then tries to negotiate critical non-economic concessions from the board; agency fees are the highest union priority in districts that have not already agreed to it. Unfortunately, once a school board has agreed to an agency fee, it is extremely difficult to remove the fee in subsequent contracts. Practically speaking, the union needs only to win the concession once to institutionalize it in future contracts. As more and more districts in an area agree to agency fees, it becomes more and more difficult for the remaining districts to hold out against them.

The fact that the agency fee comes out of the pockets of the teachers, not the school district budget, greatly enhances its appeal to school boards.

Another common scenario relates to the impact of agency fees upon veteran teachers who object to paying the fees, or to desirable prospective teachers who object to them. If the district employs veteran teachers who object to agency fees, it seems unconscionable to fire them for refusal to pay the fees. The union may offer to apply the fee requirement only to currently employed teachers who do not object to the fees and new teachers. The requirements to be exempted from having to pay the fee vary widely but the unions seek to limit their applicability as much as possible.

At the table, board negotiators sometimes object to agency fees on the grounds that desirable new teachers may refuse to be employed by the district because of the agency

fee requirement. Although such cases happen, this is probably a weak argument in most cases because few school boards can document a significant number of refusals to accept employment for this reason. A much stronger board objection to agency fees is that it will not bargain away teacher rights to effectively oppose union actions or to petition government for redress of grievances. The validity of these arguments against agency fees is not affected by the number of relevant cases from year to year.

Finally, we cannot overlook the fact that many school board members owe their election to the union or fear its opposition if they oppose agency fees. Some board members accept the union argument and others feel that their objections are futile because so many boards have agreed to agency fees. When candidates for school board face the option of teacher union support or opposition, depending on the candidate's position on agency fee issues, they tend to find more merit in agency fees. Significantly, the U.S. Court of Appeals for the 6th Circuit (Michigan, Ohio, Kentucky, and Tennessee) has held that public employers have a duty to protect the constitutional rights of their employees; the union's agreement to reimburse public employers for any excessive fees does not fulfill this duty.[7] Perhaps the threat of penalties against school board members will induce them to be more sensitive to the constitutional rights of the teachers they employ.

Chapter 4
Challenges to Excessive Agency Fees

The NEA asserts that about 63 percent of its expenditures are for collective bargaining. Its affiliated state associations generally set the agency fees as 65 to 80 percent of regular dues. Surprisingly enough, the NEA does not claim the same percentage for itself in every state, but the differences need not concern us here. The AFT asserts that 67 percent of its national dues are for bargaining, and that as much as 94 percent of its state revenues are chargeable. The chargeable expenses for local affiliates varies, but 70 percent of regular dues would be close enough for most local teacher unions.

The NEA and AFT claim that the fact that relatively few teachers challenge the fees shows that most teachers believe that the fees are fairly computed. The facts relating to challenges to agency fees support a contrary conclusion.

Assume the dues (local, state, and national) are $600 and the union asserts that 75 percent ($450) of local state, and national dues are chargeable, that is, are for collective bargaining. If the union's chargeable expenses are really only 50 percent of dues, the challenger stands to gain $150. Note, however, what the teacher must do to get his/her $150 from the union. The teacher must resign from the union and submit a request in proper legal form for the union's allocations of chargeable and nonchargeable expenses. These allocations will be based upon the union's expenditures for the prior year. If the teacher does not accept the union's determination of the agency fee for the prior year, the teacher must sue the union to recover the excess charges.

Practically speaking, individual teachers cannot scrutinize the expenditures of the state and national unions to determine whether the union's allocations are correct. Indeed, even at the local level, it is practically

impossible for an individual teacher to do so without expert legal assistance. Inasmuch as the most the teacher can accomplish is the return of any excessive payment with interest, the enormous legal costs to recover a small amount are daunting obstacles to a challenge, no matter how justified.

To appreciate the difficulty of challenging excessive agency fees, we must consider how the unions allocate their expenditures. An example may suffice to illustrate the problems. "UniServ directors" are the NEA's full-time union business agents. Most are employed by a state association but negotiate for a local association or a group of local associations, usually referred to as a "UniServ Council." A substantial percentage of union expenses that are charged to nonmembers is based on UniServ time. If UniServ directors devote 85 percent of their time to collective bargaining, 85 percent of their support costs (secretaries, supplies, equipment, etc.) are also allocated to collective bargaining. To support union claims of chargeability, UniServ directors prepare time sheets, often on a weekly basis. The sheets are used solely for the purpose of supporting union claims of chargeability, if and when such claims are challenged.

A substantial percentage of union expenses that are charged to nonmembers is based on UniServ time.

How much UniServ time is devoted to chargeable activities? Obviously the answer to this question depends on several factors. If multiyear contracts are negotiated, no time thereafter may be required for bargaining for two or three years, when it becomes necessary to negotiate a new contract. Poorly drafted contracts may lead to more grievances and more time devoted to contract administration; quite often grievances require more time than negotiating contracts. Personal factors often play a significant role; intransigent local association leaders or school board members may drag out negotiations for several months. The time devoted to impasse procedures is often affected by the availability and attitudes of mediators and fact-finders. In short, it is impossible to predict how union staff will utilize their time; reconstructing their

utilization of it can be extremely difficult, even if an effort is made to maintain contemporaneous records.

Needless to say, the union enjoys an enormous advantage in litigation over whether staff time was devoted to chargeable or nonchargeable activities. Suppose the UniServ director attends a UniServ council meeting at which the agenda includes:

- Bargaining strategy in the districts;
- Union endorsed candidates for the state legislature;
- Endorsements of candidates in the school board election;
- PAC deductions in the contracts;
- Health insurance in school district contracts compared to benefits in proposed health care legislation;
- Pending state legislation on state aid to education.

Suppose also the meeting lasts four hours. The UniServ directors are fully aware of the financial implications of their time records. Legal confusion and faulty memory aside, the timesheets inevitably exaggerate the chargeable time. Precise allocations of chargeable time would require mountains of records and render it difficult for staff to concentrate on the business at hand. At the same time, lump sum allocations are inevitably tilted toward chargeable expenses. Furthermore, the procedure underscores the enormous difficulties in impeaching UniServ time sheets years later, if and when the allocations of time are being challenged by nonmembers. All of the participants in the UniServ council meetings will be association leaders and negotiators who have a strong interest in maximizing chargeability. The teachers who were not present at the meetings face enormous difficulties in discrediting the allocations a year or more after the meetings.

According to NEA publications, the UniServ directors:

- Manage all political activities within their unit;
- Coordinate their activities with union political action committees (PACs);
- Train union PAC representatives and distribute

materials;

- Collect and transmit PAC contributions to the state PAC official within three (3) days.[8]

In conjunction with their other political responsibilities, UniServ directors obviously devote considerable time to political activities. What counts is how UniServ directors categorize their time; how their time is actually divided is practically irrelevant. The nonmember (and you must be a nonmember to challenge the allocations) is not present when the allocations are made. In practice, the allocations are based on the prior year's expenditures. Thus, even if a nonmember recognized an excessive allocation to chargeable time in 1998-99, that would have no bearing on the agency fee that had to be paid during that year.

In conjunction with their other political responsibilities, UniServ directors obviously devote considerable time to political activities.

In any case, teachers who are in the classroom all day cannot monitor the time of union staff in order to challenge the agency fee the following year. The simple truth is that teachers typically cannot protect their rights relating to agency fees without legal assistance. In the past, the unions tried to require teachers to utilize union controlled procedures to challenge excessive fees, but such requirements have been rejected by the courts. The issue was resolved in *Miller v. ALPA*.[9] In this case, the issue was "whether an objector must exhaust a union-provided arbitration process before bringing an agency-fee challenge in federal court." The U.S. Supreme Court held that "unless they agree to the procedure, agency fee objectors may not be required to exhaust an arbitration remedy before bringing their claims in federal court."

The AFT is just as likely as the NEA to require excessive agency fees. In taking credit for the Clinton-Gore victory in 1992, the American Teacher pointed out:

> AFT staffers were assigned to help coordinate activities in Illinois, Michigan, Ohio, New York, Pennsylvania, Georgia, Missouri, Louisiana, Connecticut, Oregon, and Minne-

sota. Others helped write material for distribution to members. The union also boosted its retiree staff to help organize AFT's seniors, and two health care staffers were assigned to work with the Clinton/Gore Healthcare Action Team.

The agency fees in the AFT were not adjusted downward to reflect these nonchargeable activities; the percentage of dues charged to agency fee payers did not change as a result of these political activities. One interesting bit of evidence on the issue is how the AFT categorized its expenditures before the Supreme Court decisions on agency fee issues. In 1995-96, AFT dues were $108.40, and the AFT charged 74.82 percent of this amount ($81.25) as the national office share of agency fees. This is more than twice as much as the 35.5 percent spent for "collective bargaining and organization" in the 1972 AFT budget, when the revenue implications of this budget item were not an issue.

The most persuasive evidence on NEA/AFT overcharging agency fee payers is the litigation record. According to the National Right to Work Legal Defense Foundation (NRTWLDF), it litigated 668 cases against the teacher unions from 1968 to July 1996. Of these, 365 were still open and 303 were closed as of July 1, 1996. Of the closed cases, 270 – 90 percent – resulted in an agency fee reduction. As of April 1996, NRTWLDF had litigated 587 agency fee cases for public employees who challenged one or more aspects of the fee. The majority of these cases have been against the NEA and its affiliates. NRTWLDF attorneys achieved a reduction of fees in 460 of these cases. Some involved procedures, but procedures are often critical. For example, NRTWLDF attorneys litigated the cases that overturned the union's right to control the rebate procedure from beginning to end, even to selecting the "impartial arbitrator."

NRTWLDF cases arose in every state that required or allowed agency fees. Perhaps the most compelling

fact about the cases is that they were not litigated because they were the most egregious cases of union overreaching. Even if they were, they would constitute a strong argument that the NEA and the AFT are engaged in questionable accounting practices in order to maximize revenue streams, but the case for this conclusion is much stronger.

The cases that are litigated are only a small part of the picture. Bear in mind that NRTWLDF is a charitable foundation with limited resources. Furthermore, NRTWLDF provides legal assistance only if asked to do so. The vast majority of agency fee payers do not ask for legal assistance. In fact, the majority pay full union dues or very close to that amount. Many do not know that help may be available or that their rights are being violated. Many who know that help is available prefer to avoid the publicity and pressure of a lawsuit.

The stakes in the agency fee cases, and the staggering costs involved in litigating them fully, are illustrated by *Belhumeur et al v. Massachusetts Teachers Association* (MTA).[10] The case was initiated in 1989 and was still in the Massachusetts courts in 1998. The plaintiffs were more than 100 K-12 teachers and university professors. The main issue was whether the MTA had met its burden of proof in setting the agency fee over a five-year period.

After lengthy pretrial discovery, the trial began in February 1993. The trial required 53 days, leading to a transcript of 7,920 pages of testimony. More than 11,000 exhibits, many of them long documents, were introduced. The database eventually included 56,373 records, and required extensive computer services in order to cross index and compare various documents, such as the time sheets of UniServ directors. During the trial, the MTA unsuccessfully sought a ruling that the legal expenses of the trial were wholly chargeable to nonmembers. The MTA was also unsuccessful in its effort to retry each item on which it had failed to meet its burden of proof. At one point, the trial days had to be rescheduled because

the union's lawyers were on strike against the MTA. In the course of the litigation, NRTWLDF attorneys discovered that the MTA had helped to organize a boycott of Folger's coffee which was contrary to U.S. policy, and opposed by the State Department, the U.S. Catholic Bishops, and labor unions in El Salvador. It was also discovered that the MTA vice-president had met with Cuban trade union officials, traveled to Costa Rica to meet with El Salvadorian unionists, and traveled to Canada to study its "single payer" health care system. The MTA had categorized all of these activities as chargeable to agency fee payers.

The union position is that no illegality is involved even if the contract specifies payment equal to union dues and assessments. Under U.S. Supreme Court decisions, the nonmembers must object to the fee. If they do not object, they must pay the agency fee, whatever the amount; if they object, they get a refund of the nonchargeable expenses. The union position is that illegality would come into play only if a nonmember objected and did not receive due process and/or the appropriate reduction. The NEA/AFT also oppose any legal obligation on their part to inform teachers of their rights concerning agency fees. Union determination to take advantage of teachers' lack of information about teacher rights is hardly consistent with the ideal of a union or professional organization devoted to protecting them.

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Because of the huge litigation costs involved in agency fee cases, the cases that are litigated reflect only a small fraction of the requests for legal assistance; the requests for legal assistance come from only a small fraction of the districts in which legally excessive fees are collected from nonmembers. As previously noted, the NEA/AFT contend that the small number of challenges demonstrates widespread teacher acceptance of full dues or agency fees ranging from 60 to 90 percent of dues. The insincerity of their position is evident from the fact that the unions do not notify unit members of their agency

fee rights unless required to do so by court order or the threat of one.

Sometimes NEA/AFT leaders inadvertently invite attention to their lack of candor on agency fee issues. For example, in urging merger with the AFT, NEA president Keith Geiger asserted that "the local affiliates were just tired of spending tons of money fighting each other. ...They came to the conclusion that spending all that time and money isn't improving education and isn't improving the plight of their members.[11] AFT statements on merger asserted the same conclusion.[12] Competing for representation rights against a rival union is not a chargeable expense to agency fee payers. Inasmuch as the unions now concede that such expenditures aren't helping teachers, it would be interesting to see whether the "tons of money" spent this way were illegally charged to agency fee payers, or who among their current leaders were responsible for wasting "tons of money" this way.

The unions do not notify unit members of their agency fee rights unless required to do so by court order or the threat of one.

The obstacles facing teachers who challenge agency fees must be considered in the context of the union stake in the outcome. When a teacher challenges an excessive agency fee, the union has to consider the impact of the challenge on other teachers who might be affected by the outcome. Suppose there are 1,000 agency fee payers in the state, and the teacher alleges that the chargeable amount for the state association should be only $300 instead of $450. The state association faces a loss of $150,000 (1,000x$150) if the challenge is upheld, but that would be only part of its loss if the teacher wins the lawsuit. The lower agency fee may lead many teachers to resign their membership, which could result in even greater financial losses to the union. Losing the lawsuit would encourage more teachers to scrutinize the agency fee amounts, and the union would have to reveal more about its internal operations than it would like to do. Furthermore, any loss of membership would weaken the union politically, especially if other teacher organizations posed a threat to union membership. In short, while the indi-

vidual teacher has only the possibility of a small monetary gain, the unions have a huge stake in crushing any challenge to agency fees. Understandably, the unions devote huge resources to agency fee cases. As the *Belhumeur* case illustrates, it is not unusual for these cases to last for several years and require millions in legal and ancillary expenses. Needless to say, individual teachers cannot absorb the expenses of defending their rights in agency fee cases, regardless of the merits of their claims. In some states, teachers can get redress from their state labor boards, but most of these boards tend to have a pro-union orientation on agency fee issues.

The huge costs of agency fee litigation are not the only reason why there are relatively few challenges to excessive agency fees. The fact is that relatively few teachers know their rights relating to agency fees. Sad to say, school boards often don't know very much about agency fee issues, or don't care enough about them to protect teacher rights on this issue. Board members elected as a result of union support are not likely to raise the issue, and neither are many board members who uncritically accept the union position on the issue.

In addition to substantially increasing union revenues, agency fees generate substantial savings in union expenditures. Teachers paying $300 to $500 in agency fees are not likely to invest a comparable amount in a rival organization. In the absence of agency fees, the NEA/AFT would have to devote much more resources to recruiting members and fighting off rival organizations.

In Hawaii, Minnesota, and New York, state statutes require all public school teachers to pay agency fees from the first day of employment. These statutes provide huge benefits for the teacher unions. If they were required to negotiate on the subject, some school boards would refuse to agree to agency fees, and others might delete the fees in future negotiations. Furthermore, if the unions were required to negotiate for agency fees, school boards could insist upon important union concessions in return. In contrast, when agency fees are mandated by statute, the

unions need not make any concessions to get the benefit. Even when required to bargain over agency fees, however, the unions are usually successful in achieving it over several years of bargaining.

Religious objections to agency fees

Some teachers object to agency fees on religious grounds. That is, the teachers believe that their religious beliefs preclude contribution to a teacher union. Appendix A sets forth an agency fee article that has a religious exemption. In Appendix A, teachers seeking a religious exemption must still pay an amount equivalent to dues to a charitable organization. As a practical matter, the charitable organizations are designated by the union, since the school district has no particular interest in the matter. The teachers may wish to contribute to other charities, but they are limited to the ones designated in the contract. Note that the teachers must reaffirm their religious objections every year. In contrast, the teacher commitments to the union continue without annual affirmation. The unions make it especially difficult to claim a religious objection because the unions do not get any revenue from teachers claiming the exemption.

Teachers must reaffirm their religious objections every year. In contrast, the teacher commitments to the union continue without annual affirmation.

The penalty issue

In many states, the agency fees are the same as union dues, initiation fees, and general assessments paid by members. How can this continue to be if the agency fee is constitutionally limited to the employees pro rata share of the costs of collective bargaining? The reason is that the courts have not usually inflicted penalties on the unions and school boards that require excessive agency fees. All the courts have typically done, even after protracted expensive litigation, is to order the unions to return the nonchargeable amounts with interest.

As long as the courts do not penalize excessive agency fees, the unions will set the fees as the full amount

of regular dues and assessment of union members. If teachers do not challenge the assessment, the unions get every penny they could possibly receive. If teachers challenge the assessment, the worst that can happen is that the union will be ordered to return the excess amount with interest. Unquestionably, the failure of the courts to inflict any costly penalties on the unions for excessive agency fees, even in the most egregious cases, is a major reason why excessive agency fees are the rule instead of the exception in agency fee states.

Chapter 5
Conclusions and Recommendations

The foregoing analysis has led to several negative conclusions about agency fees. Such fees:

- Infringe on individual rights that should not be subject to union/school board contracts or by state legislative enactments.
- Are usually much higher than are legally allowed by U.S. Supreme Court opinions and guidelines on the subject.
- Are promoted for reasons that are hardly more than slogans and cannot withstand critical scrutiny.
- Avoid legal challenge only because teachers are not aware of their rights, or lack the resources to protect their rights.
- Lead to higher union dues and revenues while weakening teacher ability to influence union actions of any kind.
- Weaken teacher opportunities to choose an alternative to the incumbent union.
- Are subject to widespread accounting abuse at every step of the procedures utilized to compute the agency fees.

Even on the most benign view of the matter, agency fees constitute taking money from employees for purposes they do not wish to support, and for activities that may be against their interests.

Some of these criticisms are more important than others and theoretically, some could be corrected by the teacher unions, although this is not likely to happen. But even on the most benign view of the matter, agency fees constitute taking money from employees for purposes they do not wish to support, and for activities that may be against their interests. The unions should no more be entitled to take money this way than someone who installs a television set in your house against your wishes and then insists that you pay for the "benefits". The fact that the other home owners on the block voted to approve the installation would be irrelevant.

Interestingly enough, union security varies in other industrial nations. Only a few require union membership before employment. The most frequent issue is whether it can be required after employment. In some na-

tions, the issue is left to agreements between employers and unions. In a few, employees must join a union, but have the freedom to choose the union. Note, however, that the European Community Charter on Fundamental Social Rights includes an explicit prohibition of agency fees; the charter language is as follows:

> Employers and employees within the European Community have the right to associate freely for the purpose of forming professional associations or trade unions of their choice, for the defense of their economic and social interests. Every employer and every employee has the right to join these organizations, and is not to be subjected to any personal or work related penalty for doing so.[14]

The above quotation demonstrates that agency fees are not an inherent feature of labor relations in a democratic society that is hospitable to labor unions. The contrary is true, just as it is in many states in the United States that prohibit agency fees. In the United States, the most active opponent of agency fees is the National Right to Work Committee. The NRTWC is a national organization devoted to protecting union members against forced membership or forced employee contributions to unions. Its major objective is a national right to work law that would effectively end agency fees in the private sector. Needless to say, unions display an extremely hostile attitude toward the NRTWC, and its supporters are subject to extremely disparaging union attacks.

Teachers subject to agency fees

Teachers subject to agency fees should write or call the National Right to Work Legal Defense Foundation (NRTWLDF) for assistance. The NRTWLDF provides assistance at no charge to teachers seeking redress in agency fee and other cases of union violations of employee rights. It frequently happens that the teacher unions insist upon improper procedures in informing teachers of their rights or in calculating the fees that are charged to nonmembers. The NRTWLDF employs a team of lawyers who specialize in agency fee issues. The organization has won several impor-

tant cases on agency fee issues before the U.S. Supreme Court and is unquestionably the most effective organization devoted to protecting teacher rights in agency fee cases. The NRTWLDF can be reached at:

National Right to Work Legal Defense Foundation
8001 Braddock Road
Springfield, VA 22160
Tel: 800/336-3600
Email: legal@nrtw.org
Website: http://www.nrtw.org[14]

As pointed out previously, teachers must be nonmembers of the union in order to challenge an agency fee. Union members opposed to agency fees, however, can help to reduce or eliminate them. By pointing out their unfairness and violation of individual rights, union members may be able to change the contracts that require agency fees.

Both union members and nonmembers should take cognizance of nonchargeable expenses likely to be charged to agency fee payers. For example, if the union assigns staff members to work on election campaigns, members and nonmembers should note the dates and names of the staff members so assigned. Both should request to see the time sheets of union staff within a week or two after the time sheets are completed. This would enable the requesting parties to monitor the allocations of chargeable time more effectively. The union may reject these requests but doing so would weaken its political and legal position; what valid reason can the union have in hiding its allocations of chargeable time from its own members as well as nonmembers who have an important stake in the accuracy of the reports? Furthermore, union refusal to allow union members and agency fee payers to review the allocations in timely fashion will help to build a persuasive case for legislation on the subject.

School board members and school administrators

School board members and school administrators should seek to eliminate agency fees as a violation of the individual rights of their employees. They should recognize

that a teacher's choice of representative is an extremely important right. Agency fees are tantamount to requiring someone to be represented by an attorney whom the client does not want as his/her representative.

If unable to eliminate agency fees, board members and school administrators should make every effort to ensure that fee payers can monitor the chargeable expenses. For example, a board member may be serving on a school board that votes 5 to 4 to require agency fees. One of the five board members who support agency fees might agree that agency fees should be conditional upon access to union allocations of chargeable time no later than 14 days after any time is charged to fee payers. This condition should also apply to state and national teacher unions. That is, unless teachers have access to state and national charges within a reasonable time, the unions should not be entitled to agency fees. To protect the rights of their teachers, even board members who support agency fees should be willing to insist upon procedural protections like these for their teachers subject to agency fees.

State legislators should repeal the statutes that require or allow agency fees.

The point here is to avoid oversimplified assumptions about agency fee supporters. Board members may support agency fees but be willing to consider conditions that enhance their fairness. Quite often, the only way to test this possibility is to propose these conditions to the school board and see what happens.

State legislators

State legislators should repeal the statutes that require or allow agency fees. If unable to achieve outright repeal, legislators should support teacher "Right to Know" statutes. These statutes should ensure that union members and nonmembers alike have the right to know how the unions allocate their expenses as chargeable or nonchargeable within a definite period of time, such as two weeks, after the expenses are incurred.

These recommendations are based upon an important but widely overlooked anomaly in our labor laws. Unions of state and local public employees are not regulated by fed-

eral labor law, which applies only to unions of private sector employees involved in interstate commerce. State and local public sector unions are governed by state statutes, most of which were enacted in the 1960s, 1970s, and 1980s. These state statutes were enacted at the behest of unions of state and local public employees; union attorneys and lobbyists drafted most of this legislation. In doing so, these union representatives deleted the provisions in federal labor law that protect union members from the unions. As a result, teacher protections against their unions simply do not exist in most states.

The fact of the matter is that teachers have much less protection against malfeasance by teacher union officials than private sector employees have with respect to their union officials. For example, under the National Labor Relations Act, union officials must declare any financial transactions with the union. Such a requirement is necessary to prevent union officers and staff from enriching themselves through financial transactions with the union. Unfortunately, state labor laws do not provide comparable protection for unions of state and local public employees. Teacher "Right To Know" statutes would be a helpful alternative where it is not possible to abolish agency fees altogether.

Appendix A
Agency Fee Article

The following agency fee article has been taken from an existing school district contract, with a few editorial changes to avoid identification. The article can be considered a strong pro-union one, because it includes a number of provisions that make it difficult for teachers to avoid payment of full union dues and assessments.

Inasmuch as most of the issues have already been discussed, only a few additional points need be noted here. The "Optional Procedure" illustrates the minimal concern for teacher rights on issues pertaining to dues. A relatively small group of teachers has religious objections to paying dues or service fees to the union. Such bona fide objections do not release the teachers from an obligation to pay; they serve only to release the teacher from an obligation to pay the union. So the teacher has to pay, but to whom? The designated list of charities is extremely narrow, but cannot be expanded without union approval (**section (2)1b**). In some contracts, the designated list of charities includes only union foundations or scholarship funds; the nonmember who does not wish to contribute indirectly to the union can look forward to an endless stream of litigation by union lawyers.

Finally, to safeguard against the possibility that teachers might drop their religious objections but continue to avoid payment, **section (2)1c requires that the Optional Procedure** be repeated every year, or the teacher pays the union. Parenthetically, one reason the unions are so adamant about restricting the religious objections to agency fees is that the union receives no income from the religious objector. Unlike the teachers who object on religious grounds, objectors on other grounds must still pay the agency fee to the union.

The union's emphasis on dues and service fees is further illustrated by Paragraph 7, which ensures that there will be no float accruing to the district, and that the union will be able to identify non-payers immediately. Paragraph 9 ensures that there will be no payroll deduction for any plans or programs opposed by the union.

(1) Organizational Security and Payroll Deductions

1. Any employee who is a member of the Association who signs and delivers to the District an assignment authorizing deduction of unified membership dues, initiation fees and general assessments of the Association, or service fee (representation fee), shall have such authorization continue in effect from year to year unless revoked in writing between June 1 and September 1 of a given year. Any such revocation should be effective for the next school year. Pursuant to such authorization, the District shall deduct such dues, fees or assessments (or service fee) from the regular salary check, in ten (10) equal installments each year, for the duration of this Agreement.

2. The District will provide bargaining unit employees new to the District with a copy of the Collective Bargaining Agreement and the employee will sign a form, a copy of which will be forwarded to the Association within ten (10) days of the employee reporting to work.

3. Any employee who is a member of the Unit, who is not a member of the Association in good standing, or who does not make application for membership within thirty (30) days from the first day of active employment (except as provided hereafter in the Optional Procedure), shall pay a service fee to the Association: an amount equivalent to the United Membership dues, initiation fee and general assessments uniformly required to be paid by members of the Association.

4. In the event an employee fails to comply with this Article, at the request of the Association, the Superintendent or his designee shall notify the employee within (10) days that he/she is not complying with his/her contractual obligation to the Association and the District. A copy of such notice shall be sent to the Association.

5. The District shall deduct service fees from the salary or wage order of the employee who is not a member

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of the Association, or has not complied with the Optional Procedure.

Any employee may pay service fees directly to the Association in lieu of having such service fees deducted from the salary or wage order.

In the event that a unit member shall not pay such fee directly to the Association or authorize payment through payroll deduction as provided in paragraph 1, the Association shall so inform the District and the District shall immediately begin automatic payroll deduction in the same manner as set forth in paragraph 1 of this Article.

Any payment to a charity must be made on an annual basis.

6. The parties further agree the obligation of this Article shall be grounded in the individual contract for employees, which shall state – "this contract is subject to a collective bargaining agreement heretofore or hereafter negotiated by the District and the exclusive bargaining representative of employees employed by the District. The terms of such collective bargaining agreement are incorporated herein, and by accepting this contract, you agree to be bound by all such terms, including Organizational Security and Payroll Deductions provisions thereof."

7. The District agrees promptly to remit such monies to the Association accompanied by an alphabetical list of employees for whom such deductions have been made.

8. The Association agrees to furnish any information needed by the District to fulfill the provisions of this Article.

9. Upon appropriate written authorization from the employee, the District shall deduct from the salary of any employee and make appropriate remittance for annuities, credit union, and savings bonds. Deductions for any other plans or programs shall be jointly approved by the Association and the district.

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10. Dues Checkoff – Authorization in effect on date of the signing of this Agreement shall remain in effect but shall be subject to the conditions set forth in this Article.

11. The Association agrees to indemnify and hold the district harmless from any and all claims arising from a bargaining unit member represented by the Association concerning the implementation of this article, provided such implementation is done by the district in good faith and in a non-negligent manner. In such case, the Association shall have the exclusive right to defend such suits and to determine which matters shall be compromised, resisted, tried, or appealed.

12. The district agrees to deduct dues or service fees pursuant to the schedule submitted by the Association for employees who execute a form currently in use or any mutually agreed upon form. The Association is to submit the schedule each year by September 7. The schedule may be amended once each school year with thirty (30) days notice.

Optional Procedure

(2) Religious Objection

1. Any employee of this unit who has bona fide religious beliefs which prohibit him/her from joining or financially supporting employee organizations shall not be required to join or financially support the Association or its affiliates. However, that employee shall utilize the following Optional Procedure:

   a. Submit a notarized statement to the Association with a copy to the employer by the end of the first month (September) of each school year. The statement shall state that the person does not desire to join or contribute to the Association because of religious beliefs that prevent him/her from joining or contributing.

   b. Make payment equal to unified membership dues to a nonreligious, non-labor organization ex-

empted under Section 501(c)(3) of Title 26 of the Internal Revenue Code. The list of designated charitable organizations is: Heart Fund, Cancer Fund, Cystic Fibrosis Foundation or others approved by the Association.

c. Proof of such payment (i.e., payment to one of the charities on the list of designated charities) shall be submitted to the Association with a copy to the District by the end of the first month of each school year (September).

This procedure is applicable only to employees who have elected to not join in financial support of the Association and/or its affiliates based on personal beliefs and who annually continue to exercise that option.

2. Any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support the Association as a condition of employment, however, such employee shall be required to pay sums equal to the service fee to one of the following charitable funds exempt from taxation under Section 501(c)(3) of Title 26 of the Internal Revenue Code:

   a. American Cancer Society
   b. American Heart Association
   c. Children's Memorial Hospital
   d. School District Educational Foundation

3. Any employee claiming the religious exemption shall, as a condition of continued exemption, provide the Association with copies of receipts from the charity selected as proof that such payment has been made, or shall authorize payroll deduction of such payments.

Appendix B
NYSUT Notice to All Nonmembers

Agency Fee Refund Procedures for the 1997-98 Fiscal Year

Appendix B shows how the unions continue to extract excessive fees, in this case, full union dues from teachers by misleading notices to teachers. New York is a state in which all teachers are required to pay agency fees by state law. The union does not have to bargain for it on a district by district basis. As pointed out in Chapter 2, this results in extremely high agency fees.

In this notice, teachers are first told that the deductions will be equivalent to union dues. The second paragraph is misleading in two ways. It gives the impression that the teacher's right to object is grounded in state law and sets forth a substantially inaccurate standard for determining chargeability. The constitutional standard is whether the activities are germane to collective bargaining, contract administration, or grievance processing, which is much more restrictive than the criteria in the notice. Furthermore, the notice states that the teacher can appeal to an arbitrator appointed by the union; needless to say, if any arbitrator selected by the union ever rendered a decision that was inimical to union interests, that arbitrator would not be selected again by the union. In fact, the appeal procedures in this notice have been ruled unconstitutional by the U.S. Supreme Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Notice to Nonmembers

New York State Civil Service Law, Chapter 606, L. 1992 was amended to provide for mandatory agency shop fee deductions. In accordance with the amendment, your local will be making agency fee deductions in an amount equivalent to union dues as follows.

Pursuant to Chapter 677, Laws of 1977, as amended by Chapter 678, Laws of 1977 and Chapter 122, laws of 1978,

you have the right to object to the expenditure of any part of the fee which represents expenditures by the Union or its affiliates (hereinafter "Union") in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment.

For the 1997-98 fiscal year, your objections shall be made, if at all, by individually notifying the Union President by mail during the period between May 15 and June 15, 1997. No deduction will be made until after the objection period has closed.

Should you object, your fee will be reduced for the 1997-98 school year by the approximate proportion of the agency fees spent by the Union for such political and ideological purposes, based on the latest fiscal year for which there is a completed and available audited financial statement. You will be provided at the beginning of the new school year with an advance payment equal to the amount of the reductions, together with an explanation as to how such advance reduction was calculated.

If you are dissatisfied with the amount or appropriateness of the reduced fee, you may appeal that determination in writing and send it to the Union President by mail within thirty (30) days following receipt of the advance reduction. At such time, you must indicate to the Union President the percent of agency fees which you believe are reasonably in dispute. The question of appropriateness of the advance reduction will thereafter be submitted by the Union to a neutral party appointed by the American Arbitration Association for expeditious hearing and resolution in accordance with its rules for agency fee determinations. The costs for any appeal to a neutral party shall be borne by the Union.

The Union, at its option, may consolidate all appeals and have them resolved at one hearing held for such purpose. You may present your appeal in person.

At the close of the Union's fiscal year, as soon as available, the Union will provide you with a copy of the audited financial statements, including the final refund determination covering the fiscal year for which your objection was made.

Appendix C
Local Union
Letter to Nonmembers

Appendix C illustrates the kind of notice sent by local unions to nonmembers in order to persuade them to become members. Although not as coercive as the state notice, the notice sets forth an erroneous legal standard for determining chargeability. Again, the standard is not the teacher's "fair share of the cost of . . . representation." It is the teacher's pro rata share of costs germane to collective bargaining, grievance processing, and contract administration.

August 15, 1997

Dear Nonmember,

You are receiving this packet of materials because our records indicate that you are not a voting member of the _____ Education Association. We would like to have you join us as an active participating member.

As you know, the United States Supreme Court has ruled that employees who are not union members but who are represented exclusively by a union may be compelled to contribute their fair share of the cost of that representation. This payment is called an agency fee.

As an agency fee payer, you have certain rights which are explained in these materials. As a nonmember, you have precluded your involvement in the organizational life of the union and are unable to have a voice in establishing policies or electing leadership at local, state, and national levels.

I urge you to join your colleagues in membership. As a union in which individuals elect its leaders and establishes its policies, we can only be as good and effective as our members make us. While the desire for increased compensation is a given, this cannot be our only goal. Some of our goals for this year are to reactivate our committees, have more members become actively involved, and work toward changes and improvements with an open and positive approach.

If you are newly employed in our district, take the time to seek out elected leadership to learn more about us. If you feel there is an ideological or philosophical reason for you not to join us, please, come and talk to us about it.

If you wish to change your agency fee status to that of a voting member, please contact me for a membership enrollment form.

We need you to help make the _____ Education Association the best it can be. However, if you still wish to retain your agency fee status and receive your refund, you must inform me in writing by October 1, 1997.

Sincerely,

John Smith
Union President

Endnotes

[1] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[2] *Lehnert v. Ferris Faculty Association*, 111 S. Ct. 1950 (1991).

[3] *Marquez v. Screen Actors Guild*, No. 97-1056, U.S. Supreme Court, decided November 3, 1998.

[4] *Steele v. Louisville and N.R.* 323 U.S. 192 (1944).

[5] *City of Madison Joint School District No. 8 v. Wisconsin Public Employment Relations Commission*, 429 U.S. 167 (1976).

[6] See the articles by Edwin Vieira, Jr., in the references.

[7] *Weaver v. University of Cincinnati*, 970 Fed. 2d 1523 (CA 6th), 1992.

[8] The *NEA Series on Practical Politics* is the source; probably one reason the series is no longer available to others.

[9] *Miller v. ALPA*, 118 S. Ct. 1961 (1998).

[10] *Belhumeur v. Massachusetts Teachers Association* Agency Service Fee - 2143, decision rendered April 23, 1997. This case was still active in the Massachusetts courts as of November 1998.

[11] *New York Times*, June 23, 1993, p. 18.

[12] Ibid.

[13] Article 11, Charter Draft of November 1989. Some members of the European Community allow union security provisions that violate Article 11. Cited in Sheldon Leader, *Freedom of Association* (New Haven, CT: Yale University Press), p. 290.

[14] The NRTWC and NRTWLDF did not contribute and were not asked to contribute to the content, publication, or dissemination of this report.

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Notes

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